Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

MARTHA VELA WHIRLEY,
Petitioner,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR BY MERGER TO THE AMERICAN TOBACCO COMPANY, AND R. J. REYNOLDS TOBACCO COMPANY,
Respondents

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 15 U.S.C. § 1334 (b) preempts common-law claims, including claims for civil assault, conspiracy to commit civil assault, fraud, and conspiracy to commit fraud, even though such claims are not predicated on a duty "based on smoking and health."

2. Whether in a diversity case a federal court of appeals must apply "the then controlling decision of the highest state court."

LIST OF PARTIES

1. Martha Vela Whirley

2. Brown & Williamson Tobacco Corporation

   Parent Companies
   B.A.T. Industries p.l.c.

   Nonwholly Owned Subsidiaries
   None Known

3. R. J. Reynolds Tobacco Company

   Parent Companies
   RJR Nabisco Holdings Corporation
   RJR Nabisco Inc.

   Nonwholly Owned Subsidiaries
   None Known

   Affiliated Companies
   Nabisco Holdings Corporation

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The opinion of the court of appeals is unreported and reproduced in Appendix 1. The district court's opinion is unreported and reproduced in Appendix 2.

BASIS FOR JURISDICTION

The court of appeals' judgment was entered pursuant to Fed. R. Civ. P. 36 on March 2, 1998. Petitioner's Petition For Rehearing was filed on March 12, 1998 and denied by order (reproduced in Appendix 3) entered on April 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (l).

STATUTES INVOLVED

15 U.S.C. § 1334 (b):

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Tex. Civ. Prac. & Rem. Code Ann. § 82.004 (a):

> In a products liability action, a manufacturer or seller shall not be liable if: (1) the product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and (2) the product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco and butter, as identified in Comment i to Section 402A of the Restatement (Second) of Torts.

STATEMENT OF THE CASE

Martha Vela Whirley is addicted to the nicotine contained in tobacco cigarettes. She has smoked approximately 200,000 cigarettes since she began smoking in 1958 at the age of 15. She has been unsuccessful in repeated efforts to quit smoking, despite experiencing persistent coughing, frequent respiratory infections, and fear of contracting cancer from smoking.

The nicotine addiction which afflicts Whirley has been recognized in the medical community as both an illness and an impairment of physical condition. Federally sponsored research led the U.S. Surgeon General to conclude that in addicting persons, nicotine acts like heroin and cocaine[1]. The addictive properties of nicotine have been known to the tobacco industry longer than Whirley has been a smoker.

Whirley sued the makers of the tobacco cigarettes she smoked in state court on common-law theories of civil assault, negligence and fraud. The cigarette makers removed this case to federal district court in Corpus Christi, Texas, and immediately filed a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings. The cigarette makers predicated their motion upon the grounds that: (1) Whirley's fraudulent concealment claim was preempted by 15 U.S.C. § 1334 (b); and (2) all of Whirley's claims were barred by Tex. Civ. Prac. & Rem. Code Ann. ("TCPRC") § 82.004 (a).

The parties agreed to abate all discovery pending the district court's ruling upon the motion. The district court granted the motion and in its opinion concluded that: (1) all of Whirley's claims were preempted by 15 U.S.C. § 1334 (b); and (2) all of Whirley's claims were barred by TCPRC § 82.004 (a). Whirley filed a motion for reconsideration which was overruled in an order of the district court

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[1]See attached excerpt (Appendix 4) from the Health Consequences of Smoking: Nicotine Addiction, A Report of The Surgeon General (1988).

dated May 15, 1997.

On June 20, 1997, the Texas Supreme Court issued its opinion in an unrelated case, *The American Tobacco Co. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997) ("*Grinnell*"). The *Grinnell* opinion held that the addictive dangers of tobacco were not always "common knowledge" in Texas. That the addictive dangers of tobacco were "common knowledge" when Whirley smoked was a predicate condition, however, to Respondents' immunity from liability to Whirley under TCPRC § 82.004 (a).

Whirley perfected an appeal to the U.S. Court of Appeals for the Fifth Circuit, which allowed oral argument on February 4, 1998. The court of appeals affirmed without issuing an opinion, but declared its ruling to be without precedential value beyond this case. Whirley's timely filed Petition for Rehearing was denied on April 8, 1998.

ARGUMENT

FIRST QUESTION PRESENTED

I. WHETHER 15 U.S.C. § 1334 (b) PREEMPTS COMMON-LAW CLAIMS, INCLUDING CLAIMS FOR CIVIL ASSAULT, CONSPIRACY TO COMMIT CIVIL ASSAULT, FRAUD, AND CONSPIRACY TO COMMIT FRAUD, EVEN THOUGH SUCH CLAIMS ARE NOT PREDICATED ON A DUTY "BASED ON SMOKING AND HEALTH."

A. **The Court's opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) ("*Cipollone*") lacks clarity, and that lack of clarity has caused great confusion among trial and appellate judges, concerning the scope of preemption under 15 U.S.C. § 1334(b).**

The *Cipollone* Court held that preemption under 15 U.S.C. § 1334 (b) had to be determined on a claim-by-claim basis. In particular, it held that to be preempted a claim must satisfy two conditions: (1) the claim must be predicated upon a duty ("requirement or prohibition") based upon smoking and health; and (2) the claim must be predicated upon a duty relating to advertising or promotion. *Cipollone*, 505 U.S. at 523.

In applying such claim-by-claim analysis to the claims asserted in that case, the *Cipollone* Court held such claims preempted or not as follows:

1. failure to warn claims, "insofar as ... [they] require a showing that [defendants'] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings," are preempted (*Cipollone*, 505 U.S. at 523-24);

2. failure to warn claims, "that rely solely on [defendants'] testing or research practices or other actions unrelated to advertising or promotion," are not preempted (*Cipollone*, 505 U.S. at 526);

3. breach of express warranty claims, even where "the terms of the warranty may have been set forth in advertisements rather than in separate documents," are not preempted, because "the 'requirements' imposed by an express warranty claim are not 'imposed under State law,' but rather imposed by the warrantor" (*Cipollone*, 505 U.S. at 526-27);

4. fraudulent misrepresentation claims, "that [defendants], through their advertising, neutralized the effect of federally mandated warning labels," are preempted because "[s]uch a claim is predicated on a state-law prohibition against

statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking" (*Cipollone*, 505 U.S. at 527);

5. fraudulent concealment claims, "insofar as those claims rely on a state law duty to disclose [material] facts through channels of communication other than advertising or promotion," are not preempted because "[predicated upon] a state law duty not to make false statements of material fact or to conceal such facts" (*Cipollone*, 505 U.S. at 528);

6. fraudulent misrepresentation claims, "that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements)," are not preempted because "not predicated on a duty 'based on smoking and health' but rather on a more general obligation - the duty not to deceive" (*Cipollone*, 505 U.S. at 528-29); and

7. conspiracy to commit fraud claims, whether fraud by "misrepresent[ation] or conceal[ment] of material facts" are not preempted because predicated upon "a duty not to conspire to commit fraud" (*Cipollone*, 505 U.S. at 530-31).

The *Cipollone* Court's treatment of fraud claims appears inconsistent, given its stated reason for finding some of such claims not to be preempted. On the one hand, it held that fraudulent misrepresentation claims were not preempted, even those based on allegedly false statements of material fact made in advertising, because those claims are based upon the general duty not to deceive. On the other hand, it held that fraudulent concealment claims were not preempted, but only to the extent those claims "rely on a State law duty to disclose [material] facts through channels of communication other than advertising or promotion." The duty not to deceive is the

basis for all common-law fraud claims, however, whether the fraud is accomplished by misrepresentation, concealment, non-disclosure or half-truth.[2]

The confusion among trial and appellate judges over the *Cipollone* preemption analysis of fraud claims is seen in various published opinions. In *Castano v. The American Tobacco Co.*, 870 F. Supp. 1425 (E.D. La. 1994) ("*Castano*"), the court held that fraudulent concealment claims were **not preempted**.

> **Plaintiffs allege fraud and deceit by the defendants: that the defendants intentionally failed to disclose, and in fact concealed, the fact that nicotine is addictive, and that defendants were manipulating the nicotine content in cigarettes while concealing their manipulation.**
>
> . . . . . .

Cipollone provides clear guidance on this claim. The Supreme

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[2] *See e.g., Wilson v. Jones*, 45 S.W.2d 572 (Tex. Comm'n App. 1932, holding approved)(**false** representation of fact); *Texas Industrial Trust v. Lusk*, 312 S.W.2d 324 (Tex. Civ. App.--San Antonio 1958, writ ref'd)(statement of opinion as to future event made with knowledge of its **falsity**); *Russell v. Industrial Transportation Company*, 251 S.W. 1034 (Tex. Comm'n App. 1923, holding approved)(statement of opinion that is **false** made by one claiming special knowledge of the subject of the opinion); *Trenholm v. Ratcliff*, 646 S.W.2d 927 (Tex. 1983)(**false** statement of opinion based upon past or present facts, when made by one claiming special knowledge of the subject of the opinion, or when made by one in reckless disregard as to its truth); *Stanfield v. O'Boyle*, 462 S.W.2d 270 (Tex. 1971)(**false** promise of future action made with intent not to perform); *Blanton v. Sherman Compress Company*, 256 S.W.2d 884 (Tex. Civ. App.--Dallas 1953, no writ)(literally true representation used to create a **false** impression); *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432 (Tex. 1986)(failure to disclose in order to correct **false** impression created by prior disclosure); *Campbell v. Booth*, 526 S.W.2d 167 (Tex. Civ. App.-- Dallas 1975, writ ref'd n.r.e.) (concealment of true facts in order to induce reliance upon **false** understanding).

Court declared that claims that "require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings....are preempted." 112 S. Ct. 2621-22. However, the Court found no "general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damage actions." *Id.* at 2618. **Cipollone addressed the merit of the plaintiff's claims of fraudulent misrepresentation and conspiracy, holding that they were not preempted, even as they related to defendants' advertising and promotion, because "such claims are not predicated on a duty `based on smoking and health' but rather on a more general obligation--the duty not to deceive."** *Id.* at 2623-24. The Cipollone plurality determined that Congress intended the phrase "relating to smoking and health" to be "construed narrowly, so as not to proscribe the regulation of deceptive advertising." *Id.* at 2624. **"Unlike state law obligations concerning the warning necessary to render a product reasonably safe, state law proscriptions on intentional fraud rely only on a single, uniform standard: falsity."** *Id.*

. . . . . .

Under Cipollone, plaintiffs' fraud and deceit claims in this case must be maintained and defendants' motion to dismiss the plaintiffs' fraud and deceit claims is therefore denied.

Castano, 870 F. Supp. at 1431-33 (emphasis added).

By contrast, in *Allgood v. R. J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir. 1996) ("*Allgood*"), the court cited *Cipollone* as authority for the proposition that fraudulent concealment claims were **preempted**.

To the extent that plaintiff's claims are based on fraudulent concealment or a failure to warn after 1969, **they are preempted** by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340. *Cipollone v. Liggett Group, Inc.*,

505 U.S. 504, 122 S.Ct. 2608, 120 L.Ed.2d 407 (1992)(plurality opinion).

Allgood, 80 F.3d at 171 (emphasis added).

In *Scott v. Philip Morris Inc.*, 959 F. Supp. 340 (E.D. La. 1996) ("*Scott*"), the court cited *Cipollone* as authority for holding that fraudulent misrepresentation claims were **not preempted**.

> Finally, the defendants' argument that the plaintiffs' claims are barred by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* ignores the clear distinction made the cornerstone of the Supreme Court's opinion in Cipollone v. Liggett Group, Inc., ... As recognized by Judge Heebe in Castano v. The American Tobacco Company, ..., **the Supreme Court found that the claim of fraudulent misrepresentation was not preempted because "such claims are predicated not on a duty 'based on smoking and health,' but rather on a more general obligation not to deceive.**

Scott, 959 F. Supp. at 344.

In *Perez v. Brown & Williamson Tobacco Corp.*, 967 F. Supp. 920 (S.D. Tex. 1997) ("*Perez*"), the court cited *Cipollone* as authority for holding that fraudulent misrepresentation claims and fraudulent concealment claims were **preempted**.

> **Basically, Plaintiffs' claims of (1) conspiracy, (2) fraud and misrepresentation, and (3) breach of implied warranties are claims alleging that the Defendants misrepresented and concealed the health risks of cigarette smoking.** The Court FINDS that all of these claims are [*sic*] stem from duties based on smoking and health.
>
> . . . . . .
>
> Given the similarity of the allegations between this case and Allgood, **the Court CONCLUDES that Plaintiffs' claims of**

> (1) conspiracy, (2) **fraud and misrepresentation**, and (3) breach of implied warranties **are preempted** by the Federal Cigarette and Labeling Advertising Act, 15 U.S.C. 1334 (b), pursuant to *Cipollone v. Liggett Group, Inc.*, ...

Perez, 967 F. Supp. at 928 (emphasis added).

In *Laborers Local 17 Health & Benefit Fund v. Philip Morris Inc.*, No. 97 Civ. 4550, 1998 U.S. Dist. LEXIS 3578 (S.D.N.Y. Mar. 26, 1998) ("*Laborers*"), the court cited *Cipollone* as authority for holding that fraudulent misrepresentation claims and fraudulent concealment claims were **not preempted**.

> **Count V of the complaint alleges that defendants intentionally "misrepresented, failed to disclose and concealed material facts" about the hazards of tobacco use.** Compl. P 265. The Act preempts fraudulent misrepresentation claims that merely allege that defendants should have included additional or more clearly stated warnings in their advertisements. Cipollone, 505 U.S. at 524. **Plaintiffs, however, allege intentional fraud, both by false representation and by concealment of material facts. Cipollone expressly held that claims of fraud by intentional misstatement are not preempted because they "are predicated not on a duty 'based on smoking and health' but rather on a more general obligation: the duty not to deceive." The Act, therefore, does not bar Plaintiffs' fraud claims.**

Laborers, 1998 U.S. Dist. LEXIS at * 25 (emphasis added).

In *The American Tobacco Co. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997) ("*Grinnell*"), the court cited *Cipollone* as authority for holding that fraudulent concealment claims were **preempted**.

> **The fraudulent concealment claims are preempted because**

> **they too are premised on American's failure to disclose information regarding the dangers of cigarettes.** This claim is essentially a variation on the Grinnells' failure to warn claim because it is based on American's alleged duty to disclose information about the harmful effects of cigarettes .... **Fraudulent concealment claims are preempted insofar as they rely on a state-law duty to disclose facts through advertising or promotion.** *Cipollone*, 505 U. S. at 524-528.

Grinnell, 951 S.W.2d at 439-440 (emphasis added).

In *Burton v. R. J. Reynolds Tobacco Co.*, 884 F. Supp. 1515 (D. Kan. 1995) ("*Burton*"), the court cited *Cipollone* as authority for holding that fraudulent misrepresentation claims and fraudulent concealment claims were **not preempted**.

> **Count 7 is a misrepresentation and concealment claim** in which plaintiff contends that the defendants knew that use of their products caused cancer and vasculatory disease, yet willfully chose to conceal those facts from the public.
>
> Accordingly, based upon this court's reading of Cipollone, **the court finds that Counts 7, 8 and 11 of plaintiffs' complaint, which allege fraudulent concealment, conspiracy to commit fraud, and violation of the KCPA for deceptive advertising practices, are not necessarily preempted by the 1969 Act, and therefore defendants' motion to dismiss those counts on preemption grounds is denied.**

Burton, 884 F. Supp. at 1521 (emphasis added).

In *DaSilva v. The American Tobacco Co.*, No. 106075/97, 1997 N.Y. Misc. LEXIS 607 (N.Y. Super. Ct. 1997) ("*DaSilva*"), the court cited *Cipollone* as authority for holding that fraudulent misrepresentation claims and fraudulent concealment claims were **preempted**.

> The complaint alleges that each of the plaintiff smokers purchased and smoked cigarettes, became addicted to the product and have been afflicted with cancer as a result of their cigarette habit. **The complaint contains a total of ten causes of action. The first four allege that the smokers' use of cigarettes and their resulting affliction with cancer are attributable to** the defendants' failure to warn them about the dangers of cigarettes prior to the enactment in 1969 of the Federal Cigarette Labeling and Advertising Act (First Cause Action); **the defendants' fraud, deceit and negligence in marketing cigarettes and making representations to the public about the safety of the product** (Second and Third Causes of Action);
>
> . . . . . .
>
> Applying the Supreme Court's decision to the complaint herein, **the defendants' motion to dismiss the Plaintiffs' claims based on a failure to warn, fraudulent concealment and implied warranty after the effective date of the Labeling Act in 1969 is granted. These claims are preempted.**

DaSilva, 1997 N.Y. Misc. LEXIS at *1 and *9-10 (emphasis added).

In *Cantley v. Lorillard Tobacco Co., Inc.*, 681 So.2d 1057 (Ala. 1996) ("*Cantley*") the court cited *Cipollone* as authority for holding that fraudulent concealment claims were **preempted.**

> **Applying Justice Stevens's reasoning first to the question whether Cantley's fraudulent suppression claim is preempted by federal law we must conclude that it clearly is.** Because § 1334 (b) "preempts ... the imposition of state-law obligations ' with respect to the advertising or promotion' of cigarettes [,]" claims that a cigarette maker concealed material facts are preempted insofar as those claims relied on a state law duty to disclose such facts through advertising or promotion

methods. *Cipollone*, 505 U.S. at 528. A fraudulent suppression claim against a cigarette maker seeking relief based on smoking-related illness or death can avoid federal preemption only if the claim is based "on a state-law duty to disclose [the allegedly concealed material] facts through channels of communication other than advertising or promotion." *Id.*

. . . . . .

Cantley's fraudulent suppression claim merely alleged generally that the defendants had failed to inform Godfrey of the risks of smoking. Because manufacturers in the position of the defendants R. J. Reynolds and Lorrillard can ordinarily communicate with consumers like Godfrey only through "advertising or promotion" channels of communication, we must conclude that Cantley's fraudulent suppression claims, as pleaded, are inevitably based upon a "state-law duty to disclose ... facts through ... advertising or promotion" channels of communication and, therefore, that they [are] preempted. ***Id.*** The trial court judge properly entered summary judgment against Cantley's fraudulent suppression claims.

Cantley, 681 So.2d at 1061 (emphasis added).

Although the *Cipollone* Court characterized two claims involved in *Cipollone* as "fraudulent misrepresentation claims," [3] it held one preempted and the other not preempted. *Cipollone*, 505 U.S. at 528-530. In speaking of the former, the *Cipollone* Court stated:

Such a claim is predicated on a State-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking.

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[3] See sub-paragraphs 4 and 6 on pages 4 and 5 *supra*, and *Cipollone* case citations referenced in same.

Cipollone, 505 U.S. at 527. In speaking of the latter, the *Cipollone* Court stated:

> The predicate of this claim is a State law duty not to make false statements of material fact or to conceal such facts.

Cipollone, 505 U.S. at 528. Based upon these descriptions of state-law duties underlying the two "fraudulent misrepresentation claims," it appears that the *Cipollone* Court made reference to the petitioner's first such claim as a "fraudulent misrepresentation claim," because the petitioner so denominated it, rather than because it was cognizable as a common-law fraud claim. Whatever was intended by the *Cipollone* Court, however, trial and appellate judges have conflictingly interpreted *Cipollone* to hold that fraudulent misrepresentation claims are preempted and not preempted.

In speaking of fraudulent concealment claims, the *Cipollone* Court stated:

> [15 U.S.C. § 1334 (b)] preempts only the imposition of state law obligations "with respect to the advertising or promotion" of cigarettes. **Petitioners' claims that respondents concealed material facts are therefore not preempted insofar as those claims rely on a state law duty to disclose such facts through channels of communications other than advertising or promotion**, " Thus, for example, if state law obliged respondents to disclose material facts about smoking and health to an administrative agency, [15 U.S.C. § 1334 (b)] would not preempt a state law claim based on a failure to fulfill that obligation.

Cipollone, 505 U.S. at 528 (emphasis added). Elsewhere in its opinion, however, the *Cipollone* Court stated:

> [In 15 U.S.C. § 1334 (b)], **Congress offered no sign that it**

wished to insulate cigarette manufacturers from longstanding rules governing fraud.

Cipollone, 505 U.S. at 529 (emphasis added). It thus appears that the *Cipollone* Court may not have considered the concealment claims alleged in that case to be claims cognizable as common-law fraud claims. Again, whatever was intended by the *Cipollone* Court, however, trial and appellate judges have conflictingly interpreted *Cipollone* to hold that fraudulent concealment claims are preempted and not preempted.

B. Members of the *Cipollone* Court recognized the lack of clarity in the plurality opinion, and foresaw that trial and appellate judges would have difficulty implementing *Cipollone's* holdings.

Justice Blackmun, joined by Justices Kennedy and Souter, stated:

> Given the Court's proper analytical focus on the scope of the express preemption provisions at issue here and its acknowledgment that the 1965 Act does not preempt state-law damages claims, I find the Court's conclusion that the 1969 Acts preempts at least some common-law damages claims little short of baffling
>
> . . . . . .
>
> In short, I can perceive no principled basis for many of the Court's asserted distinctions among the common-law claims, and I cannot believe that Congress intended to create such a hodge-podge of allowed and disallowed claims when it amended the preemption provision in 1970. Although the Court acknowledges that [15 U.S.C. § 1334 (b)] fails to "indicate that any familiar subdivision of common-law claims is or is not preempted," *ante*, at 2621, it ignores the simplest

> and most obvious explanation for the statutory silence: that Congress never intended to displace state common-law damages claims, much less to cull through them in the manner the Court does today. **I can only speculate as to the difficulty lower courts will encounter in attempting to implement the Court's decision.**

Cipollone, 505 U.S. at 533-34 and 543 (emphasis added). Likewise, Justice Scalia, joined by Justice Thomas, stated:

> **Like Justice BLACKMUN, "I can only speculate as to the difficulty lower courts will encounter in attempting to implement [today's] decision."**
>
> . . . . . .
>
> A disposition that raises more questions than it answers does not serve the country well.

Cipollone, 505 U.S. at 555-56 (emphasis added).

C. Because of confusion over the *Cipollone* preemption analysis in the case at bar, both a district court and a court of appeals concluded that a state-law civil assault claim was preempted, even though such claim is not predicated on a duty "based on smoking and health."

Under Texas common law, a defendant commits a civil assault if he or she commits an assault within the meaning of the Texas Penal Code. *Texas Bus Lines v. Anderson*, 233 S.W.2d 961, 964 (Tex. Civ. App.--Galveston 1950, writ ref'd n.r.e.); *Hogenson v. Williams*, 542 S.W.2d 456, 458 (Tex. Civ. App.-- Texarkana 1976, no writ); *Holmes v. Holmes*, 588 S.W.2d 674, 676-677 (Tex. Civ. App.--Beaumont 1979, no writ); *Moore's, Inc. v. Garcia*, 604 S.W.2d 261, 264 (Tex. Civ. App.--Corpus Christi 1980, writ ref'd n.r.e.); *DeLeon v. Hernandez*, 814 S.W.2d 531, 533 (Tex. App.--Houston [14th Dist.]

1991, no writ); *Wal-Mart Stores, Inc. v. Odem*, 929 S.W.2d 513, 521-522 (Tex. App.--San Antonio 1996, no writ). Under the Texas Penal Code, a defendant commits an assault if the defendant "intentionally, knowingly, or recklessly causes bodily injury" to the plaintiff. Tex. Penal Code Ann. § 22.01(a). The Texas Penal Code defines "bodily injury" to mean "physical pain, illness, or any impairment of physical condition." Tex. Penal Code Ann. § 1.07(a)(8).

Whirley alleged that Respondents were liable to her under the Texas law of civil assault, because they intentionally, knowingly and/or recklessly caused her nicotine addiction, which constitutes both an illness and impairment of physical condition. Notwithstanding that the duty upon which Whirley's civil assault claim was predicated was the duty to refrain from "intentionally, knowingly or recklessly" causing bodily injury to another, and notwithstanding that such duty could be breached by Respondents without regard to anything they did or failed to do concerning advertising and promotion, the district court concluded that Whirley's civil assault claim was preempted "pursuant to" *Cipollone*. Moreover, the court of appeals held such ruling to be without error.

D. Because of confusion over the *Cipollone* preemption analysis in the case at bar, both a district court and a court of appeals concluded that a common-law fraudulent concealment claim was preempted, even though such claim is not predicated on a duty "based on smoking and health."

Under Texas law, a party commits actionable fraudulent concealment when: (1) the party conceals or fails to disclose a material fact within the knowledge of that party; (2) the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth; (3) the party intends to induce the other party to take some action by concealing or failing to disclose the fact; and (4) the other party suffers injury as a result of acting without

knowledge of the undisclosed fact. *New Process Steel Corp. v. Steel Corp. of Texas*, 703 S.W.2d 209, 214 (Tex. App.--Houston [1st. Dist.] 1985, writ ref'd n.r.e.); *Campbell v. Booth*, 526 S.W.2d 167, 172 (Tex. Civ. App.--Dallas 1975, writ ref'd n.r.e.). Whirley alleged that Respondents fraudulently concealed from the public generally, and Whirley in particular, their knowledge that the nicotine contained in their cigarettes caused nicotine addiction in persons who smoked them. Notwithstanding that the duty upon which Whirley's common-law fraudulent concealment claim was predicated was "the duty not to deceive," the district court concluded that Whirley's claim was preempted "pursuant to" *Cipollone*. Again, the court of appeals held such ruling to be without error.

E. Because of confusion over the *Cipollone* preemption analysis in the case at the bar, both a district court and a court of appeals concluded that common-law conspiracy claims were preempted, even though such claims were not predicated on a duty "based on smoking and health."

Under Texas common law, the elements of a civil conspiracy cause of action are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result. *Massey v. Armco Steel Company*, 652 S.W.2d 932, 934 (Tex. 1983). Whirley alleged that Respondents conspired: (1) to commit civil assaults against the public generally, and Whirley in particular, by conspiring to cause nicotine addiction in persons who smoked Respondents' cigarettes; and (2) to fraudulently conceal from the public generally, and Whirley in particular, their knowledge that the nicotine contained in their cigarettes caused nicotine addiction in persons who smoked them. Notwithstanding that the duties upon which Whirley's civil conspiracy claims were predicated were the duties (1) not to conspire to commit civil assault and (2) not to conspire to commit fraud, and notwithstanding that the *Cipollone*

Court had expressly held that a conspiracy-to-commit-fraud claim was not preempted because predicated upon "a duty not to conspire to commit fraud," the district court concluded that Whirley's civil conspiracy claims were preempted "pursuant to" *Cipollone*. Once again, the court of appeals held such ruling to be without error.

F. **With an estimated 430,000 Americans dying each year from tobacco-induced diseases, and countless others being afflicted annually with such diseases, a clear articulation of the extent of preemption of common-law damages claims could not be more important.**

The U.S. Department of Health and Human Services Centers for Disease Control and Prevention ("the CDC") estimates that approximately 430,000 Americans die each year as a result of tobacco-induced diseases.[4] Many more Americans are first diagnosed each year as being afflicted with such diseases.[5] The CDC has concluded that "among children living in America today, 5 million will die an early death because of a decision made as a child [to smoke cigarettes]."[6]

It is no use of hyperbole to state that the Court is unlikely to confront an issue more important to the nation than the extent of preemption of common-law damages claims available to tobacco victims. Many millions of Americans already have been, and many millions of additional Americans will be, directly harmed by tobacco-induced diseases, because they have been or will be afflicted with such diseases. Many millions of additional Americans have been or will be indirectly harmed by tobacco-induced diseases, because they

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[4] *See* Appendix 5.

[5] *See* Appendix 5.

[6] *See* Appendix 5.

are the sons, daughters, spouses or parents of those afflicted with such diseases.

SECOND QUESTION PRESENTED

II. WHETHER, IN A DIVERSITY CASE, A FEDERAL COURT OF APPEALS MUST APPLY "THE THEN CONTROLLING DECISION OF THE HIGHEST STATE COURT."

In ruling upon Respondents' 12(c) motion, the district court held that all of Whirley's claims are both preempted by 15 U.S.C. § 1334(b) and barred by TCPRC § 82.004(a). Since Whirley's claims are not predicated upon "a duty based on smoking and health," the court of appeals could validly affirm the district court's judgment only if Whirley's claims are barred as a matter of law by TCPRC § 82.004(a). The state law in effect at the time when the court of appeals affirmed, however, precluded a determination that, as a matter of law, Whirley's claims are barred by TCPRC § 82.004(a).

TCPRC § 82.004(a) creates immunity from liability in a "products liability action"[7] **only if**: (1) the product is a consumer product intended for personal consumption; **and** (2) the product is inherently unsafe; **and** (3) the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community. Thus, in holding that Respondents are immune from liability to Whirley under TCPRC § 82.004(a), as a matter of law, the district court held by necessary implication that, as a matter of law, Respondents' tobacco products were known to be unsafe, at applicable times and places, by the ordinary consumer who consumed those products with the ordinary

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[7] Whirley disputes that this case qualifies as a "products liability action" within the meaning of TCPRC §82.004 (a), but this Court need not decide that issue.

knowledge common to the community.

Whirley claims that Respondents' tobacco products caused Whirley to experience nicotine addiction. Correspondingly, for Respondents to be immune from liability to Whirley under TCPRC § 82.004(a) with respect to such claims, it would have to be established that the ordinary consumer of Respondents' tobacco products, who consumed those products with the ordinary knowledge common to Whirley's community, knew that those products caused nicotine addiction. Thus, in holding that Respondents are immune from liability to Whirley under TCPRC § 82.004(a), the district court held by necessary implication that, as a matter of law, in Whirley's community and at all times of Whirley's tobacco products use it was "common knowledge" that Respondents' tobacco products caused nicotine addiction.

The district court relied upon the opinion of the court of appeals in *Allgood v. R.J. Reynolds Tobacco Company*, 80 F.3d 168 (5th Cir. 1996) ("*Allgood*"), in concluding that the "common knowledge" requirement of TCPRC § 82.004(a) was established in this case as a matter of law. The district court explained its justification for thus relying upon *Allgood*, by stating that "Fifth Circuit precedents containing *Erie* predictions bind this Court unless 'a subsequent state court decision or statutory amendment ... render [s] [the Fifth Circuit's] prior decision clearly wrong'." On June 20, 1997, however, and after the district court's judgment had become final, the Texas Supreme Court issued its opinion in *Grinnell*.

In *Grinnell*, the Texas Supreme Court expressly rejected the proposition that, as a matter of law, at all times in Texas it was "common knowledge" that tobacco products caused nicotine addiction. *Grinnell*, 951 S.W.2d at 426-432. The district court's holding that Respondents are immune from liability to Whirley under TCPRC § 82.004(a), as a matter of law, therefore conflicts with the holding in *Grinnell*. To the extent that the court of appeals was required to apply the holding of *Grinnell* in this case, the court of appeals erred in affirming the district court's judgment.

In *Vandenbark v. Owens-Illinois Glass Company*, 311 U.S. 538 (1941) ("*Vandenbark*"), it was held that in a diversity jurisdiction case a federal court of appeals is to apply "the then controlling decision of the highest state court." *Vandenbark*, 311 U.S. at 543. Notwithstanding *Vandenbark*, the court of appeals has repeatedly observed that it may be inappropriate to apply "the then controlling decision of the highest state court," if such decision was rendered after judgment became final, but such decision would not have been applied retrospectively by the state courts themselves. *Downs v. J. M. Huber Corp.*, 580 F.2d 794, 795-797 (5th Cir. 1978) ("*Downs*"); *Royal Bank of Canada v. Trentham Corp.*, 665 F.2d 515, 517 (5th Cir. 1981) ("*Royal Bank*"); *Moorhead v. Mitsubishi Aircraft International, Inc.*, 828 F.2d 278, 287-289 (5th Cir. 1987) ("*Moorhead*").[8] In Texas, however, "The general rule is that a decision of a supreme court is to be retrospective in its operation." *Sanchez v. Schindler*, 651 S.W.2d 249, 254-258 (Tex. 1983) ("*Sanchez*").

The Texas Supreme Court gave no indication in *Grinnell* that its holding should not be applied retrospectively. Texas state courts would therefore apply the *Grinnell* holding retrospectively. *Sanchez*, 651 S.W.2d at 254-258. Correspondingly, under *Vandenbark*, the court of appeals was bound to apply the *Grinnell* holding in this case. Because the district court's judgment necessarily conflicts with the holding in *Grinnell*, and the court of appeals was bound to apply the holding in *Grinnell*, the court of appeals erred in affirming the district

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[8] The court of appeals has suggested that the "hard and fast" application of *Vandenbark*, applied by the Ninth Circuit in *Nelson v. Brunswick Corp.*, 503 F.2d 376, 381-382 & n. 12 (9th Cir. 1974), conflicts with "the general *Erie* principles by giving retroactive application to a new state law rule even when the state's highest court would not." *Moorhead*, at 289 n. 54.

court's judgment.[9]

CONCLUSION

The court of appeals' action in this case conflicts with holdings contained in *Cipollone*. The cases interpreting *Cipollone* reflect widespread confusion regarding implementation of those holdings. The scope of federal preemption sought to be articulated in *Cipollone* is an important federal question, which stands to affect legal rights of millions of Americans. This Court's exercise of discretionary jurisdiction is warranted in this case, to clarify the scope of such preemption.

Because the court of appeals could not validly hold that all of Whirley's claims are preempted by 15 U.S.C. § 1334(b), review of the court of appeal's action in this case necessarily involves consideration of whether the court of appeals improperly failed to apply "the then controlling decision of the highest state court." The court of appeals' failure properly to apply even its own interpretation of the holding in *Vandenbark* justifies an exercise of this Court's supervisory power over the lower courts in this case.

PRAYER

Petitioner respectfully prays that this Court issue a writ of certiorari to the court of appeals in this case.

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[9] Moreover, in doing so, the court of appeals deviated from its stated practice under such circumstances as are presented in this case, to reverse and remand to the trial court. *Moorhead* at 289, citing *Downs*, *Royal Bank*, *Pesantes v. United States*, 621 F.2d 175 (5th Cir. 1980), and *Samuels v. Doctors Hospital, Inc.*, 588 F.2d 485 (5th Cir. 1979).

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARTHA VELA WHIRLEY Plaintiff,	§ § §	
vs.	§ §	C.A. NO. C-97-009
AMERICAN BRANDS, INC., ET AL., Defendants	§ § §	

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND SUA SPONTE ORDER DISMISSING CLAIMS AGAINST UNSERVED DEFENDANTS

On this day came on to be considered Defendants Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Corp. ("B&W") and R.J. Reynolds Tobacco Company ("RJR") Motion for Judgment on the pleadings against the Plaintiff Martha Vela Whirley. Defendants B.A.T. Industries, p.l.c., and American Brands, Inc. do not join in this Motion since they have not yet received service of process. For the reasons stated herein, the Court GRANTS said Motion and further ORDERS that the claims asserted against the unserved Defendants be DISMISSED.

I. JURISDICTION

This case was removed to federal court on the basis of diversity jurisdiction pursuant to 28 U.S.C. §§ 1332, 1441, and 1446.

II. FACTS AND PROCEEDINGS

On December 2, 1997, this cause of action was originally filed in the 94th Judicial District, Nueces County, Texas, and numbered Case 96-5914-C. Plaintiff Martha Vela Whirley asserts that the
Defendants manufactured and marketed tobacco products for use by members of the public. (Pl.'s Original Petition, ¶ XIII.) Plaintiff further alleges that the Defendants knew that their products contained nicotine and further that the Defendants knew that nicotine caused addiction in persons who used tobacco products. (Pl.'s Original Petition, ¶¶ XV-XVI.) Plaintiff asserts that the Defendants concealed this knowledge intentionally, knowingly, recklessly, maliciously, fraudulently, negligently, grossly negligently, and assaultingly. (Pl.'s Original Petition, ¶¶ XVIII-XXVIII.) Finally, Plaintiff alleges that the Defendants conspired to engage in the aforementioned conduct. (Pl.'s Original Petition, ¶¶ XXIX-XXX.) Plaintiff seeks recovery for personal injuries allegedly sustained as a result of Plaintiff's use of Defendants' tobacco products. (Pl.'s Original Petition, ¶ XXXIII.)

On January 3, 1997, Defendants filed a Notice of Removal based on diversity jurisdiction alleging the non-diverse defendants had been fraudulently joined and based on federal question jurisdiction alleging that the Plaintiff's claims were completely preempted by the Federal Cigarette Labeling and Advertising Act as discussed in Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 2617 (1992) (plurality opinion). On January 31, 1997, Stipulations of Dismissal pursuant to Fed. R. Civ. P. 41(a) (1) were filed voluntarily dismissing all claims against the non-diverse defendants. On February 18, 1997, Defendants filed a Second Notice of Removal asserting diversity jurisdiction.

On February 27, 1997, Defendants filed the instant Motion for Judgment on the Pleadings pursuant to Fed. R. Civ. P. 12(c). Plaintiff responded on March 17, 1997. Defendants filed a Reply to Plaintiff's Response on March 27, 1997. To date, Defendants B.A.T. Industries, p.l.c. and American Brands, Inc. have not been served. The Court now considers the Motion and conducts a sua sponte examination of the sufficiency of the claims asserted against the unserved Defendants.

III. DISCUSSION

A. Motion for Judgment on the Pleadings

A Rule 12(c) motion is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts. Herbert Abstract Co. v. Touchstone Props., Ltd., 914 F.2d 74, 76 (5th Cir. 1990) (per curiam). Like a motion for summary judgment, the motion should be granted only if there is no issue of material fact and if the pleadings show that the moving parties are entitled to prevail as a matter of law. Smith v. McMullen, 589 F. Supp. 642, 644 (S.D. Tex. 1984). A court should dismiss a complaint under Rule 12(c) if it is beyond doubt that plaintiff can prove no set of facts that would entitle him or her to relief. See, United States v. Sherlock, 1996 WL 41845 (E.D. La. 1996).

1. Federal Preemption

The preemptive provision of the Federal Cigarette Labeling and Advertising Act of 1969 states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promoting of cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). The U.S. Supreme Court in Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 2617 (1992) (plurality

opinion)[1] held that "[t]he phrase no 'requirement or prohibition'
sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." Id. at 521, 112 S.Ct. at 2620; MacDonald v. Monsanto Co., 27 F.2d 1021, 1024 (5th Cir. 1994).

Courts should inquire "whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health ... imposed under State law with respect to ... advertising or promotions,' giving that clause a fair but narrow reading." Cipollone, 505 U.S. at 524, 112 S.Ct. at 2621. The Fifth Circuit, applying Cipollone, has held that courts should "compare the particular language of a statute's preemption provision with each common law claim asserted to determine whether the common law claim is in fact preempted." MacDonald, 27 F.3d at 1024. Further, the Fifth Circuit has held that claims based on fraudulent concealment or the failure to warn are preempted by federal law. Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 172 (5th Cir. 1996); see also Cipollone, 505 U.S. at 523 n. 22, 112 S.Ct. at 2621 n. 22.

Here, Plaintiff's claims are based on allegations of fraudulent concealment. Plaintiff recognizes that the Fifth Circuit in Allgood held that such claims are preempted, but

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[1]Although Cipollone is technically a plurality opinion, "the holding of the plurality opinion that the language of § 1334(b) preempted the Plaintiff's failure to warn claim can fairly be said to constitute the view of the Court because six members of the Court concurred in that conclusion." MacDonald v. Monsanto Co., 27 F.2d 1021, 1024 n.1 (5th Cir. 1994); King v. E.I. Du Pont De Nemours & Co., 996 F.2d 1346, 1349 (1st Cir.), cert. dismissed, -- U.S. - -, 114 S.Ct. 490 (1993); Shaw v. Dow Brands, Inc., 994 F.2d 364, 370 n.4 (7th Cir. 1993)

Plaintiff respectfully urges this Court to depart from that precedent. (Pl.'s Response to Defs.' 12(c) Motion, p. 21.) In the interpretation of federal laws,

"[b]inding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit." In re NORPLANT Contraceptive Products Liability Litigation, 878 F.Supp. 972, 975 (E.D. Tex. 1995)(citing In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987), aff'd, 490 U.S. 122, 109 S.Ct. 1676 (1989)).

It is well established that a federal district court must generally apply an interpretation of law articulated by its circuit court of appeals. See, Gacy v. Welborn, 994 F.2d 305, 309 (7th Cir. 1993) (noting that "[o]urs is a hierarchical judiciary", and that lower court judges are bound to apply the existing law as interpreted by the higher courts). The proposition that a decision of the Fifth Circuit Court of Appeals incorrectly interprets an opinion by the Supreme Court of the United States must be addressed to the Fifth Circuit, the decisions of which are binding on this Court. See, Jett Racing & Sales, Inc. v. Transamerica Commercial Finance Corp., 892 F.Supp. 161, 162 (S.D. Tex. 1995).

Plaintiff further argues that the alternative grounds cited in Allgood for the dismissal of the fraudulent concealment and misrepresentation claims somehow undermine that court's determination that the fraudulent concealment claims were preempted. (Pl.'s Response to Defs.' 12(c) Motion, p. 19.) However, "[i]t has long been settled that all alternative rationales for a given result have precedential value. It does not make a reason given for a conclusion obiter dictum, because it is the only one of two reasons for the same conclusion." Oncale v. Sundowner Offshore Services, Inc., 83 F.3d 118, 120 (5th Cir. 1996)(internal quotations and citations omitted), petition for cert. filed, 1996 WL 605211 (Dec. 16, 1996).

Thus, the present case is controlled by the decision of the

Fifth Circuit in Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d
168 (5th Cir. 1996). In light of Allgood, this Court CONCLUDES that Plaintiff's claims are preempted by the Federal Cigarette Labeling and Advertising Act 15 U.S.C. § 1334(b) pursuant to Cipollone v. Liggett Group Inc., 505 U.S. 504, 112 S.Ct. 2608 (1992).

2. Statutory Bar

Texas statutory law protects a manufacturer or seller from products liability actions if

> (1) the product is inherently unsafe and the product is known *to* be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and
>
> (2) the product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter, as identified in Comment i to Section 402A of the Restatement (Second)of Torts.

Tex.Civ.Prac. & Rem. Code § 82.004(a) (emphasis added). Further, Section 82.001 of the Texas Civil Practice and Remedies Code defines products liability actions broadly as any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories.

Tex. Civ. Prac. & Rem. Code § 82.001(2) (emphasis added). Only actions based on manufacturing defects or breach of express warranties are exempted from the § 82.004(a) bar. Tex. Civ. Prac. & Rem. Code § 82.004(b).

Because jurisdiction over this action is based on diversity of citizenship, this Court is bound to apply the substantive law of the State of Texas. Erie R. Co. v. Tomkins, 304 U.S.

64, 78, 58 S.Ct. 817, 822 (1938); Rogers v. Corrosion Prods., 42 F.3d 292, 295 (5th Cir.), cert. denied, - - U.S. - -, 115 S. Ct. 2614 (1995). Further, this Court must apply the state law as it currently exists, and may not change that law or adopt innovative theories of recovery. Solomon v. Walgreen Co., 975 F.2d 1086, 1089 (5th Cir. 1992) (per curiam).

In ascertaining the law of the forum state, a federal court "is bound to apply the law as interpreted by the state's highest court." Texas Dept. Of Housing & Community Affairs v. Verex Assur. Inc., 68 F.3d 922, 928 (5th Cir. 1995) (quoting Ladue v. Chevron U.S.A., Inc., 920 F.2d 272, 274 (5th Cir. 1991)). "When there is no ruling by the state's highest court, it is the duty of the federal court to determine as best as it can, what the highest court of the state would decide." Batts v. Tow-Motor Forklift Co., 66 F.3d 743, 749 (5th Cir. 1995), cert. denied, - - U.S. - -, 116 S.Ct. 1851 (1996).

It is well established that a district court sitting in diversity is generally bound by the state law interpretations of its circuit court. Batts, 66 F.3d at 747-48; Mygsa, S.A. v. Howard Indus., 879 F. Supp 624, 627 (S.D. Miss. 1995) ("when the Mississippi Supreme Court has not spoken on an issue of state law, this Court is bound to follow the Fifth Circuit interpretation of state law."); Gordon v. American Standard, Inc., 858 F. Supp. 621, 624 (S.D. Miss. 1994). Fifth Circuit precedents containing Erie predictions bind this Court unless "a subsequent state court decision or statutory amendment ... render[s] (the Fifth Circuit's) prior decision clearly wrong." Batts, 66 F. 3d at 747.

a. Inherently Dangerous

The Fifth Circuit has found that "the dangers of cigarette smoking have long been known to the community." Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 172 (5th Cir. 1996) (citing Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988); Paugh v. R.J. Reynolds Tobacco Co., 834 F.Supp. 228, 230-231 (N.D. Ohio 1993)).

Plaintiff does not dispute the inherent danger in the use of tobacco products. Accordingly, this Court concludes that cigarettes are inherently unsafe and are known to be unsafe by ordinary consumers with the ordinary knowledge common to the community.

b. Products Liability Action

The broad and unambiguous definition of products liability actions under Texas Civil Practice and Remedies Code bars all actions based on any theory or combination of theories against a manufacturer or seller of a common consumer product that is inherently dangerous and known in the community to be inherently dangerous for recovery of damages arising out of personal injury or death allegedly caused by a that product, except those actions based on theories of breach of express warranty or manufacturing defects. See, Tex. Civ. Prac. & Rem. Code §§ 82.001(2), 82.004.

Furthermore, under Texas products liability law, a product is defective if it is (l) unreasonably dangerous as manufactured, (2)
unreasonably dangerous as designed, or (3) unreasonably dangerous because adequate warnings or instruction were not provided. Joseph E. Seagram & Sons, Inc. v. McGuire, 814 S.W. 2d 385, 387 (Tex. 199l); Lucas v. Texas Indus., Inc., 696 S.W. 2d 372, 377 (Tex. 1984) ; Sims v. Washex Machinery Corp., 932 S.W.2d 559(Tex.App. --Houston [1st Dist] 1995, no writ). Thus, the absence of a warning or instruction may render a product defective. Blackwell Burner Co., Inc. v. Cerda, 644 S.W.2d 512, 516 (Tex. App. --San Antonio 1982, writ ref'd n.r.e.); see also, Malek v. Miller Brewing Co., 749 S.W.2d 521, 522 (Tex.App. -Houston [1st Dist] 1988, writ denied).

Although Plaintiff argues that the § 82.004 bar is inapplicable to the present suit since Plaintiff's claims are not predicated upon a product defect, Plaintiff's claims are based on the assertion that Defendants' products cause nicotine

addiction and the assertion that this allegedly addictive nature of the products was not disclosed by the Defendants. Moreover, Plaintiff seeks to recover for injuries allegedly sustained by Plaintiff as a result of the addictive properties of Defendants' products. The Court is convinced that the terms "products liability action" as defined by § 82.001 includes the claims asserted by Plaintiff against the Defendant in the present suit.

The Court FINDS that the Defendants' products complained of in this action are inherently dangerous common consumer products, the inherent dangers of which are commonly known in the community. The Court FINDS that the present action is one for recovery of damages arising out of personal injury allegedly
caused by Defendants' defective products. (Pl's. Original Petition, ¶¶ XXXIX-XL.) Accordingly, the Court CONCLUDES that Plaintiff's claims of are barred by § 82.004.

B. Dismissal of the Unserved Defendants

It is well settled that the Court may dismiss a complaint on its own initiative for failure to state a claim where the inadequacy of the claim is apparent as a matter of law. Guthrie v. Tifco Indus., 941 F.2d 374, 379 (5th Cir. 1991); Shawnee Int'l N.V. v. Hondo Drilling Co., 742 F.2d 234, 236 (5th Cir. 1984). The Court FINDS that the claims asserted against the unserved Defendants, B.A.T. Industries, p.l.c. and American Brands, Inc., are identical to the claims asserted against the served Defendants who have presented the Motion for Judgment on the Pleadings. In accordance with the discussion above, the Court FINDS that Plaintiff has failed to state a claim upon which relief can be granted against Defendants B.A.T. Industries, p.l.c. and American Brands, Inc., and further FINDS that the inadequacy of these claims is apparent as a matter of law.

IV. CONCLUSION

For the foregoing reasons, the Court FINDS that Plaintiff

cannot prove any set of facts that would entitle him to relief, and further FINDS that Defendants are entitled to prevail as a matter of law upon Plaintiff's claims. Therefore, the Court GRANTS Defendants' Motion for Judgment on the Pleadings. Further, the Court FINDS that the inadequacy of Plaintiff's claims against the unserved Defendants, B.A.T. Industries, p.l.c., and American Brands, Inc., are apparent as a matter of law. Therefore, the Court ORDERS that the claims against these two Defendants be DISMISSED.

ENTERED this the 7th day of April, 1997.

/s/ Janis Graham Jack
Janis Graham Jack
United States District Judge

APPENDIX 2

(Filed March 2, 1998, U.S. Court of Appeals)

UNITED STATES COURT OF APPEALS
For The FIFTH CIRCUIT

NO. 97-40692

MARTHA VELA WHIRLEY,
Plaintiff - Appellant,

v.

AMERICAN BRANDS INCORPORATED; ET AL
Defendants,

BROWN & WILLIAMSON TOBACCO CORP., Individually and as Successor by Merger to the American Tobacco Company; R J REYNOLDS TOBACCO COMPANY,
Defendants - Appellees.

- -

Appeal from the United States District Court for the Southern District of Texas

- -

(C-97-CV-9)

Before REYNALDO G. GARZA, DUHE AND STEWART, Circuit Judges.
PER CURIAM:[1]

Having thoroughly reviewed the record, and the briefs

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[1]Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

of counsel, and having had the benefit of spirited argument by counsel for all parties, we are unable to discern any error committed by the district court. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 97-40692

MARTHA VELA WHIRLEY
Plaintiff - Appellant

v.

AMERICAN BRANDS INCORPORATED; B.A.T. INDUSTRIES P.L.C.; BROWN & WILLIAMSON TOBACCO CORP., Individually and as Successor by Merger to the American Tobacco Company; CIRCLE K STORES INCORPORATED; H.E. BUTT GROCERY COMPANY; R J REYNOLDS TOBACCO COMPANY; ET AL
Defendants

BROWN & WILLIAMSON TOBACCO CORP., Individually and as Successor by Merger to the American Tobacco Company; R J REYNOLDS TOBACCO COMPANY
Defendants - Appellees

- -

Appeal from the United States District Court for the Southern District of Texas, Corpus Christi

- -

ON PETITION FOR REHEARING

Before REYNALDO G. GARZA, DUHE AND STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ John M. Duhe
United States Circuit Judge

(Filed April 8, 1998 -
U.S. Court of Appeals)

APPENDIX 4

The Health Consequences Of Smoking

NICOTINE ADDICTION

a report of the Surgeon General

1988

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Public Health Service
Centers for Disease Control
Center for Health Promotion and Education
Office on Smoking and Health
Rockville, Maryland 20857

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

Major Conclusions

1. Cigarettes and other forms of tobacco are addicting.

2. Nicotine is the drug in tobacco that causes addiction.

3. The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.

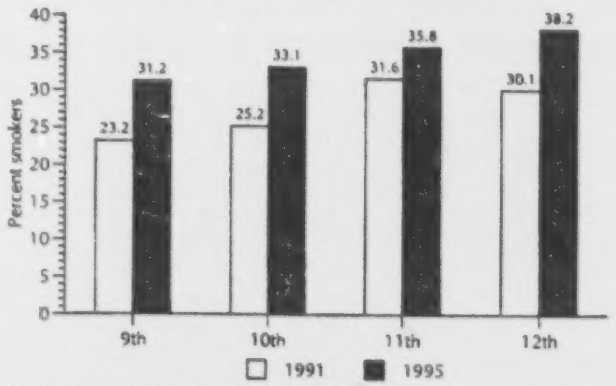
APPENDIX 5

Targeting Tobacco Use:

The Nation's Leading Cause of Death

AT-A-GLANCE
1998

Cigarette Smoking Anytime in the Past 30 Days,* by Grade in School—United States, 1991 and 1995



*Smoking one or more cigarettes during the previous 30 days.
Source: CDC, Youth Risk Behavior Surveillance System.

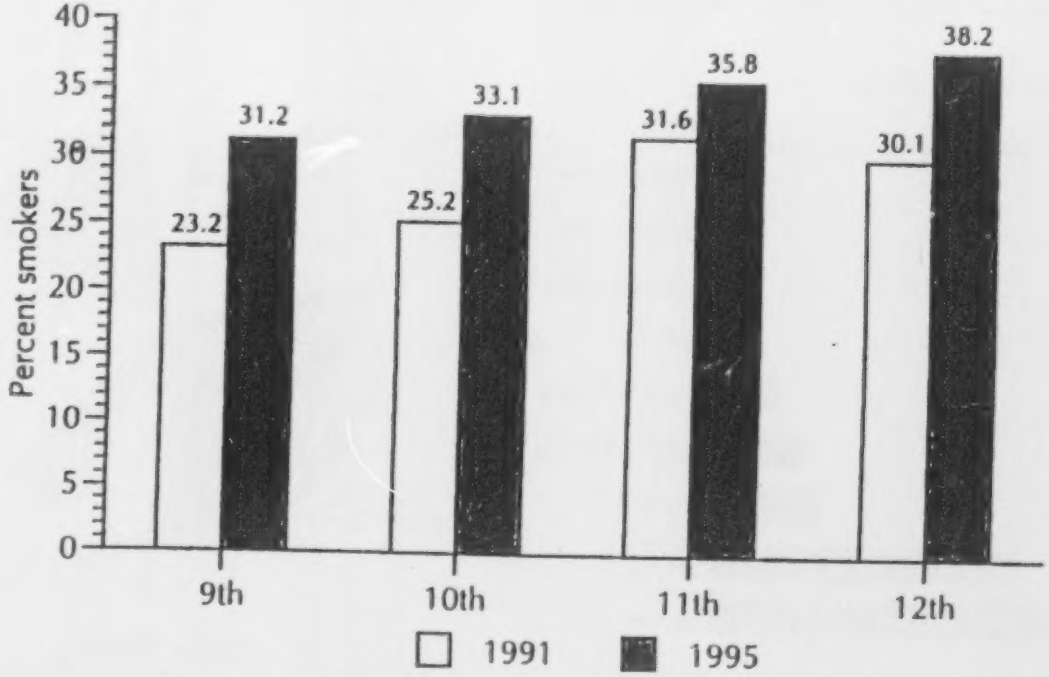
"Today, nearly 3,000 young people across our country will begin smoking regularly. Of these 3,000 young people, 1,000 will lose that gamble to the diseases caused by smoking. The net effect of this is that among children living in America today, 5 million will die an early preventable death because of a decision made as a child."

Donna E. Shalala, PhD
Secretary, U.S. Department of Health and Human Services
Testimony before the Senate Labor and Human Resources Committee, September 25, 1997

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Centers for Disease Control and Prevention

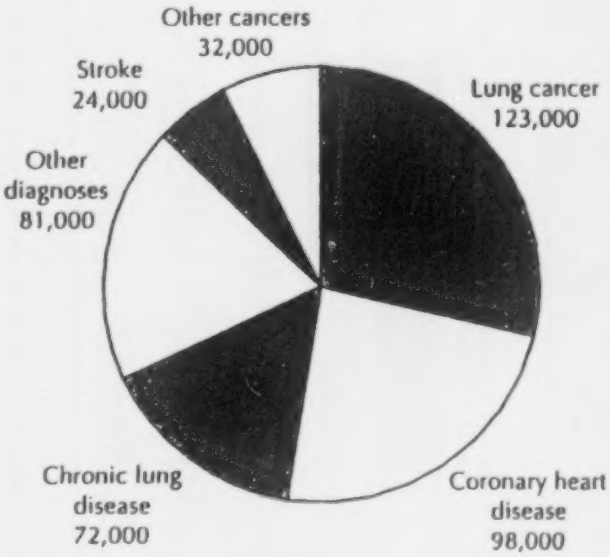
CDC

Cigarette Smoking Anytime in the Past 30 Days,* by Grade in School—United States, 1991 and 1995



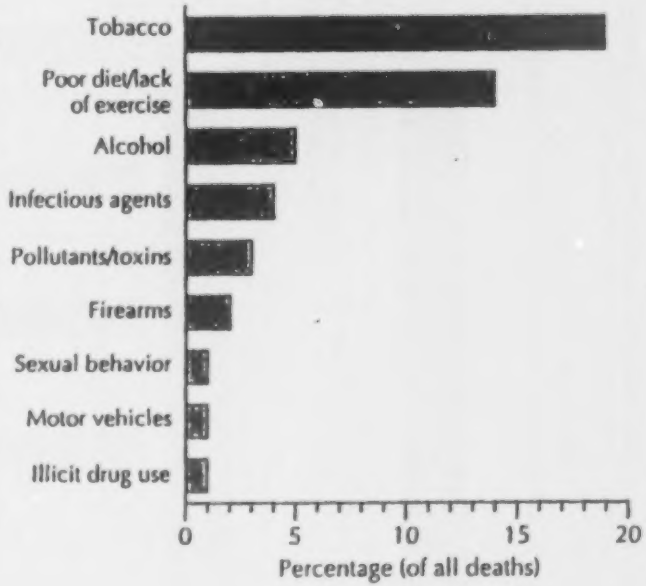
*Smoking one or more cigarettes during the previous 30 days.
Source: CDC, Youth Risk Behavior Surveillance System.

430,000 Annual Deaths Attributable to Cigarette Smoking—United States, 1990–1994



Source: CDC, *MMWR* 1997;46:448–51.

Actual Causes of Death, United States, 1990



Source: McGinnis JM, Foege WH. Actual causes of death in the United States. *JAMA* 1993; 270:2207–12.

"Today, nearly 3,000 young people across our country will begin smoking regularly. Of these 3,000 young people, 1,000 will lose that gamble to the diseases caused by smoking. The net effect of this is that among children living in America today, 5 million will die an early preventable death because of a decision made as a child."

Donna E. Shalala, Ph.D., Secretary, U.S. Dept. of Health and Human Services, Testimony before the Senate Labor and Human Resources Committee, September 25, 1997.